In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2025

JUNIOR CHAMBER OF COMMERCE OF ROCHESTER, INC., ET AL., PETITIONERS

v.

THE UNITED STATES JAYCEES, ET AL.

No. 73-2028

JUNIOR CHAMBER OF COMMERCE OF PHILADELPHIA, PA., ET AL., PETITIONERS

v.

THE UNITED STATES JAYCEES, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners brought this action against the United States Jaycees, certain state and local Jaycee organizations and foundations,[1] and seven federal

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[1]In addition to the United States Jaycees, the private defendants include the New York State Jaycees, the Pennsylvania State Jaycees, the Louisiana Junior Chamber of Commerce, Inc., the Downtown Chapter of the District of Columbia Jaycees, Maine State Jaycees, Junior Chamber of Commerce of Orrington, Inc., the United States Jaycees Foundation, the Jaycees Mental Health and Mental Retardation Fund and the Jaycees War Memorial Fund.

officials and agenices.[2] They alleged that the Jaycees' exclusion of women from membership constituted unconstitutional sex discrimination by state action, on the ground that the Jaycees are closely related to government regulation and funding. More particularly, petitioners contended that by granting tax exempt status to the Jaycee organizations (and their associated foundations), the Secretary of the Treasury, the Commissioner of Internal Revenue, and the Internal Revenue Service have endorsed and subsidized the Jaycees' discriminatory membership policy. Petitioners assert similar arguments against the Secretary of Labor, the Secretary of Housing and Urban Development, the Administrator of the Environmental Protection Agency, and the Director of the Office of Economic Opportunity, who have allowed the Jaycees to participate in the administration of various federally-funded programs.

Petitioners sought injunctive relief to require the termination of tax-exempt status of any organization whose membership discriminates on the basis of sex and the termination of any federal grants or programs which are administered through sex-segregated organizations. The district court granted the government's motion to

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[2]The federal defendants are the Secretary of the Treasury, the Internal Revenue Service, the Commissioner of Internal Revenue, the Secretary of Housing and Urban Development, the Secretary of Labor, the Director of the Office of Economic Opportunity and the Administrator of the Environmental Protection Agency.

dismiss,[3] and the court of appeals affirmed. While the court of appeals indicated that federal jurisdiction was questionable (Pet. No. 73-2025, p. A-7), its affirmance was based upon its determination that the discrimination complained of did not involve state or federal action (Pet. No. 73-2025, pp. A-8 to A-12).

1. The decision below that the challenged discrimination did not constitute state action accords with *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163. There, the Court stated (p. 173) that "where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations' * * * in order for the discriminatory action to fall within the ambit of the constitutional prohibition." Here, as the court of appeals concluded (Pet. No. 73-2028, pp. 10a-12a), there is no significant government involvement with the Jaycees membership policy.

The United States Jaycees ("Jaycees") is a nonprofit, civic-oriented organization, with affiliated state and local chapters. They are exempt from federal income taxation as "civic organizations" under Section 501(c)(4) of the Internal Revenue Code of 1954, while the three private foundations established by the Jaycees, which were joined as defendants, are exempt as charitable organizations under Section 501(c)(3). This federal tax-exempt status does not, standing alone, constitute significant government involvement in the Jaycees' exclusionary membership policy within the meaning of the *Moose Lodge* case. Indeed, as the Court observed in *Walz* v. *Tax Commission*, 397 U.S. 664, 675-676, a tax exemption does not constitute government "sponsorship" but rather creates

[3]The government had moved to dismiss on the grounds that (1) the suit was barred by sovereign immunity, and (2) the complaint failed to state a claim upon which relief might be granted. In sustaining the government's motion to dismiss, the district court did not indicate whether it was relying on the jurisdictional ground raised by the government or the failure to state a claim. With respect to the private defendants, however, it expressly dismissed for failure to state a claim (Pet. No. 73-2025, pp. B-3 to B-4).

"only a minimal and remote involvement." Accord: *Marker* v. *Shultz*, 485 F. 2d 1003 (C.A.D.C.); *Browns* v. *Mitchell*, 409 F. 2d 593 (C.A. 10); *Bright* v. *Isenbarger*, 314 F. Supp. 1382 (N.D. Ind.), affirmed, 445 F. 2d 412 (C.A. 7); *Blackburn* v. *Fisk University*, 443 F. 2d 121 (C.A. 6); *McCoy* v. *Shultz*, 31 A.F.T.R. 2d 858 (D.D.C., decided February 13, 1973).[4]

Similarly, the Jaycees' participation in the administration of various federal grants and public assistance programs[5] does not rise to the level of governmental involvement in the exclusionary membership policy attacked by petitioners. With respect to such federal grants or contracts, the Jaycees act only as a conduit through which the federal programs are implemented on a local level. In contrast to the textbook grant to racially-segregated schools struck down in *Norwood* v. *Harrison*, 413 U.S. 455, and the racially-discriminatory policy of a restaurant located in a publicly-owned building held unconstitutional in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, the federal grants here do not benefit the Jaycees but on the ultimate recipients of the funds.

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[4]In *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C.), affirmed *sub nom. Coit* v. *Green*, 404 U.S. 997, the Section 501(c)(3) exemption of segregated private schools was successfully challenged. However, *Green* was not decided on "state action" grounds but on the basis of the meaning of the term "charitable" as used in Sections 170(c) and 501(c)(3) of the Code.

[5]For example, petitioners refer (Pet. No. 73-2025, pp. 7-8; Pet. No. 73-2028, p. 3) to grants and contracts awarded the Jaycees by the Department of Health, Education, and Welfare, the Office of Economic Opportunity, the Department of Housing and Urban Development and the Department of Labor. The programs funded by such grants include such diverse civic-oriented activities as counseling Job Corps returnees, criminal justice programs, construction of low-cost housing projects, and public education on such subjects as alcohol abuse, venereal disease, danger of poisons, child abuse, etc.

With one exception,[6] petitioners do not allege that there is any discrimination with respect to the actual administration of these federally-funded programs, insofar as recipients or beneficiaries are concerned. Rather, they urge only that women have been deprived of the leadership training and experience involved in participating with the Jaycees in the administration of such programs.

Contrary to petitioners' argument (Pet. No. 73-2025, pp. 21-22; Pet. No. 73-2028, p. 12), the decision below does not conflict with *Jackson* v. *Statler Foundation*, 496 F. 2d 623 (C.A. 2), as to the federal respondents. *Jackson* held only that the plaintiff had standing to challenge state (and federal) tax exemptions of 13 charitable foundations because of alleged racially-discriminatory policies—a question the decision below did not discuss in dismissing petitioners' suit against the federal respondents. Compare *Cattle Feeders Tax Committee* v. *Shultz*, No. 73-1896 (C.A. 10, decided October 4, 1974), with *Eastern Kentucky Welfare Rights Organization* v. *Simon*, No. 74-1293 (C.A. D.C., decided October 9, 1974). Insofar as the compiaint in *Jackson* sought revocation of tax exemptions, the court held that it was deficient on its face for failure to make the New York State Tax Commission and the Secretary of the Treasury parties. The case was remanded for further proceedings to determine whether, under various criteria suggested in the majority opinion, the foundations' affairs were so closely linked to governmental action and support as to

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[6]Petitioners suggest (Pet. No. 73-2025, p. 8) that under the Job Corps program funded by the Department of Labor, the Jaycees counsel only male Job Corps returnees. The record shows, however, that the Job Corps program is designed to assist severely disadvantaged youth of both sexes. While the Jaycee volunteers are asked to assist males, a similar agency called WICS (Women in Community Service) assists the females (Ex. 274).

generate "state action" in their conduct (496 F. 2d at 629).[7] As the majority opinion in *Jackson* noted, its suggested "formulation of [a] definition of 'state action' is applicable only to claims of racial discrimination" (496 F. 2d at 635). At all events, however, there is no reason to believe that the court below applied substantially different criteria here, or that the application of those criteria would lead to a different result in this case.

2. The dismissal of petitioners' action against the federal respondents can also be supported on the alternative ground that petitioners lacked standing to sue these governmental officers and agencies. As this Court has recently reaffirmed, the doctrine of standing requires that the complaining party suffer a concrete injury caused by the action challenged as unlawful. See, *e.g., Schlesinger* v. *Reservists Committee to Stop the War,* No. 72-1188, decided June 25, 1974; *Laird* v. *Tatum,* 408 U.S. 1, 12; *Data Processing Service* v. *Camp,* 397 U.S. 150. While standing may exist where injury and causative action are only tenuously linked (see *United States* v. *SCRAP,* 412 U.S. 669, 686-690), there is no showing that the Jaycees' tax-exempt status and their administration of various federal programs caused or in any manner reinforced their "males only" membership policy, which the petitioners assert has

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[7]Judge Friendly, joined by Judges Hays and Mulligan, filed an extensive opinion dissenting from the court's denial of a motion for reconsideration *en banc.* That opinion emphasized the distinction between seeking relief against governmental involvement and relief against the foundations themselves. Judge Feinberg also dissented.

injured them. Indeed, the relief sought by petitioners against the federal respondents would not necessarily result in the admission of women to the Jaycees.

Those petitioners who are taxpayers also lacked standing to sue as such, since they failed to establish the required "logical nexus between the [taxpayer] status asserted and the claim sought to be adjudicated." *Flast* v. *Cohen*, 392 U.S. 83, 102; *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*; *United States* v. *Richardson*, No. 72-885, decided June 25, 1974. Petitioners' challenge was not addressed to the taxing and spending power of Article I, Section 8 of the Constitution and petitioners have made no claim with respect to the federal grants that the funds were being spent in violation of a "specific constitutional limitation upon the * * * taxing and spending power * * * " (392 U.S. at 104). Moreover, the real purpose of their suit is not to reduce federal expenditures or increase revenues, but to change the Jaycee membership policies.

Finally, to the extent that petitioners sought injunctive and declaratory relief against the Secretary of the Treasury, the Commissioner of Internal Revenue, and the Internal Revenue Service concerning the tax-exempt status of the Jaycee organizations, the suit is barred by the Anti-Injunction Act (Section 7421 of the Internal Revenue Code) and the tax exception to the Declaratory Judgment Act (28 U.S.C. 2201). Those two provisions respectively prohibit suits "for the purpose of restraining the assessment or collection of any tax" or declaratory suits "with respect to Federal taxes." Compare *Bob Jones University* v. *Simon*, No. 72-1470 and *Alexander* v. *"Americans United" Inc.*, No. 72-1371, both decided May 15, 1974.

For the reasons stated, the petitions for writs of certiorari should be denied with respect to the federal respondents.

Respectfully submitted.

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